

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Reexamination of Roaming Obligations of)	WT Docket No. 05-265
Commercial Mobile Radio Service Providers)	

**PETITION FOR RECONSIDERATION
OF LEAP WIRELESS INTERNATIONAL, INC.**

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Pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.429, Leap Wireless International, Inc. and its Cricket subsidiaries (collectively, “Leap”), respectfully submit this Petition for Reconsideration of the *Report and Order and Further Notice of Proposed Rulemaking* the Commission in the above-captioned docket released on August 16, 2007 and published in the Federal Register on August 30, 2007.¹

Leap supports the Commission’s determination that automatic roaming is a common carrier service and that it is “desirable and necessary to serve the public interest” for a CMRS carrier to provide such service “on reasonable and non-discriminatory terms and conditions.”² But Leap strongly urges the Commission to reevaluate its conclusion that carriers can simply ignore requests for automatic

¹ Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 07-143 (rel. Aug. 16, 2007), *summarized at* 72 Fed. Reg. 50,064 (Aug. 30, 2007) (“*Roaming Order*”).

² *Id.* at ¶ 26.

roaming in any area where the requesting carrier holds a wireless license or leases spectrum.³ The extremely broad “in-market” exception, as defined in the *Roaming Order*, effectively swallows the automatic roaming rule and defeats many of the public interest benefits that the Commission sought to promote by establishing the rule in the first place.

The exception as written runs counter to the Commission’s stated goals of “encouraging facilities-based service and supporting consumer expectations of seamless coverage when traveling outside the home area.”⁴ It is simply infeasible for a carrier to build and maintain facilities that provide service to 100% of its licensed area—particularly where a carrier holds licenses that cover very large regions. For example, immediate build-out of the licensed areas established in the AWS spectrum is not practicable given their sheer size⁵—not to mention the fact that government agencies have estimated it will take up to four years or more for the spectrum to even be cleared for commercial use. Efforts by carriers to coexist with government agency operations before clearing this spectrum, moreover, are riddled with challenges, particularly with respect to spectrum used for top-security and mobile surveillance operations. Thus, in-market roaming is essential to meeting consumer expectations of seamless coverage.

³ See *id.* at ¶¶ 46–51.

⁴ *Id.* at ¶ 49.

⁵ The Economic Area (“EA”) licenses and Regional Economic Area Grouping (“REAG”) licenses sold in Auction No. 66 are all considerably larger than cellular market areas or Basic Trading Area (“BTA”) licenses utilized in the PCS service.

More generally, automatic roaming agreements play a critical role in filling the inevitable gaps that exist in *every* carrier's network. But the Commission's *Roaming Order* forces some carriers to pay a ransom to fill those gaps. Under the Commission's decision, a carrier may refuse service in any area where the requesting carrier could theoretically provide its own service. Consequently, many small, regional, and rural competitors to nationwide incumbents will be forced to accede to exorbitant demands in order to provide their customers with seamless roaming capability. And if the competitor is formidable enough, the Commission has blessed large carrier refusals to offer roaming services at all, at any price.

Allowing carriers to disregard their common carrier obligations in certain areas is not an effective way to encourage efficient build-out. To the contrary, the "in-market" exception creates additional barriers to entry and reduces the possibility of robust competition in areas with few existing facilities-based competitors. *Nothing* in the record suggests that "in-market" roaming, as the Commission has defined the term, has actually discouraged facilities build-out. In fact, Leap has a demonstrated history of aggressively building out its licenses, despite the fact that it has limited resources and capital in comparison to the nationwide carriers. The rule the Commission has adopted in its *Roaming Order* allows nationwide carriers to exact higher rents simply because they built out their facilities first, robs new entrants of the ability to compete on even ground, and disrupts the settled expectations of market participants who have made significant investments in reliance upon the Commission's previous build-out requirements in

the licenses—particularly with respect to licenses newly acquired in the AWS auction.

The Commission’s exception for “in-market” roaming also hinders, rather than promotes, competition. As the Commission acknowledged, many small, regional, and rural carriers are finding nationwide carriers increasingly unwilling to negotiate just and reasonable terms for automatic roaming, and the Commission’s decision only exacerbates the problem. In fact, by increasing the risk that a competitive carrier will lose immediate access to reasonable, automatic roaming in its other license areas, the *Roaming Order*’s exception encourages small, regional, and rural carriers to *shrink* their service footprints so as not to jeopardize existing customers’ use of roaming service as a consequence of holding unused spectrum or acquiring new licenses. Hindering the growth of competitors who could one day offer additional nationwide service coverage, or expand services to underserved populations, is not in the public interest. Yet, in the end, the *Roaming Order* leaves room for only two kinds of carriers: the existing set of national carriers who will continue to provide expensive, inflexible nationwide service plans, and carriers with very small footprints who do not aspire to compete beyond their limited borders. This diminution of competition will deprive consumers of lower prices and improved services. It will also jeopardize the quality of existing facilities, for entrenched carriers will have less incentive to upgrade or maintain their facilities given the fewer alternatives available to customers receiving inferior service.

In sum, the broadly stated “in-market” exception does not foster the public interest by “allow[ing] competitive market forces ... to promote the development of wireless services,”⁶ but in fact shields nationwide carriers from competition and undermines effective growth of the nation’s wireless infrastructure. The sweeping “home roaming” exception simply lends a hand to national carriers as they try to pull up the ladder beyond the reach of aspiring competitors. Unless the Commission revisits its “in-market” exception, many small, regional, and rural carriers will likely encounter even more abuses of market power and, consequently, consumers will bear the burdens of higher rates and reduced coverage.

I. THE SWEEPING “IN-MARKET” EXCEPTION RENDERS COMMON CARRIER OBLIGATIONS MEANINGLESS IN PRACTICE AND DENIES CONSUMERS ACCESS TO ROAMING SERVICE AT JUST AND REASONABLE RATES

The automatic roaming rule as adopted in the *Roaming Order* provides that “it shall be the duty of each host carrier ... to provide automatic roaming to each technologically compatible home carrier, outside of the requesting carrier’s home market, on reasonable and nondiscriminatory terms and conditions.”⁷ The “home market” is not limited to areas where the requesting carrier actually provides facilities-based service, but includes “any geographic location where the home carrier has a wireless license or spectrum usage rights that could be used to provide CMRS.”⁸ In its discussion of the “in-market” or “home roaming” exception, the

⁶ *Roaming Order* at ¶ 35.

⁷ *Id.*, App. A, to be codified at 47 C.F.R. § 20.12(d).

⁸ *Id.*, App. A, to be codified at 47 C.F.R. § 20.3.

Commission states that in any area “where the would-be host carrier and the requesting CMRS carrier have wireless licenses or spectrum usage rights that could be used to provide CMRS that cover or overlap the same geographic location(s),” a CMRS carrier is not required to provide automatic roaming to a requesting carrier.⁹ The exception applies to licenses “in the cellular, covered SMR, PCS, 700 MHz or AWS bands.”¹⁰

Given the sheer size of many licensed areas (such as REAGs in the AWS spectrum), it is simply not feasible or economical to provide facilities-based service for 100% of the licensed area—nor would it make for good policy to demand that a carrier provide such coverage as a condition of the license.¹¹ Even nationwide carriers such as Verizon and Sprint have come nowhere close to building out facilities to cover all of their licensed service areas, as reflected in the attached maps (see Exhibits A and B) showing Verizon’s and Sprint’s licensed areas compared with their native footprints. And, of course, financing and constructing facilities takes time—a fact the Commission has always recognized in wireless services by setting phased build-out requirements. Nevertheless, the Commission’s new rule exempts carriers from common carrier requirements wherever the

⁹ *Id.* at ¶ 50.

¹⁰ *Id.* at ¶ 50 n.118.

¹¹ In many cases, obstructions beyond the control of carriers also make total build-out impossible. For example, local governments—which have often previously approved national carriers’ construction of facilities—often frustrate new carriers’ build-out efforts. In the AWS spectrum, moreover, large portions of spectrum are encumbered by government users and will be for years to come.

requesting carrier is licensed to provide service, regardless of the size of the licensed area or the length of time that a carrier has held a license.

It is impossible to overstate the impact that the “in-market” exception as written will have on small, regional, and rural carriers. Leap, due to its recent investment in Auction 66, would be deemed to have a “home market” covering the *vast majority of the area of the United States*, leaving it without any legal recourse in most areas if nationwide carriers demand unjust and unreasonable rates or deny service altogether. To be sure, CMRS carriers must still provide automatic roaming at just and reasonable rates in areas where the requesting carrier is not licensed to provide service, but that does not even provide a minimal level of comfort, considering that most automatic roaming agreements are negotiated on a national basis, not license-by-license basis. Thus, the leverage the “in-market” exception gives to national carriers in these negotiations will also allow them extract unjust and unreasonable rates, even with respect to areas that fall outside the so-called “home market.” Furthermore, the record reflects that at least one nationwide carrier historically has refused to provide “in-market” roaming regardless of price. In short, under the Commission’s newly adopted rule, Section 201(b) of the Communications Act effectively will be rendered a dead letter,¹² and the public interest will be affirmatively harmed.

¹² 47 U.S.C. § 201(b).

II. THE “IN-MARKET” EXCEPTION WILL UNDERMINE—NOT PROMOTE—THE COMMISSION’S STATED GOAL OF ENCOURAGING FACILITIES-BASED SERVICE

The Commission adopted the “in-market” exception on the ground that, as the nationwide carriers argued, mandating just and reasonable rates for automatic roaming in areas where the requesting carrier could build its own facilities would reduce incentives to build out networks and improve quality.¹³ The Commission should revisit that erroneous conclusion. An automatic roaming rule is necessary—even in so called “home markets”—to foster appropriate investment in infrastructure, whereas the “in-market” exception will only be detrimental to the Commission’s goals by raising entry costs and depriving the market the benefits of competition.

A. Automatic Roaming Is Necessary for Effective Service and Build-Out

As the Commission observed in its *Roaming Order*, “today CMRS consumers increasingly rely on mobile telephony services and they reasonably expect to continue their wireless communications even when they are out of their home network area.”¹⁴ If carriers were forced to rely exclusively upon their own networks to provide service, nationwide carriers would obviously be able to offer consumers a far more expansive coverage area than small, regional, and rural carriers, as they have had an enormous head start in building their networks. Small, regional, and

¹³ *Roaming Order* at ¶ 49.

¹⁴ *Roaming Order* at ¶ 3; *see also id.* at ¶ 27 (“Today, most wireless consumers expect to roam automatically on other carriers’ networks when they are out of their home service area.”).

rural carriers depend on automatic roaming to ensure that customers have the traveling flexibility that they demand.

In a competitive environment, market forces would ensure that all carriers had access to roaming at just and reasonable rates. In support of a blanket automatic roaming rule, small, regional, and rural carriers argued that nationwide carriers have adopted anticompetitive pricing practices and identified several instances of such conduct. In its *Roaming Order*, the Commission stated that it was “mindful” of the comments made by Leap and other small, regional, and rural carriers that “under current market conditions, it is getting more difficult for small and rural carriers to obtain access to nationwide carriers’ networks through automatic roaming agreements.”¹⁵ The Commission went on to explain that its new rule “takes into account these public interest concerns and ensures that, ultimately, subscribers receive automatic roaming on just, reasonable, and non-discriminatory terms.”¹⁶ But, respectfully, the Commission failed to recognize the consequences that will certainly follow from its “in-market” exception.

The Commission’s rule raises the costs of entering new markets considerably and will consequently severely handicap or reduce the number of competitors in the marketplace. As a newer entrant works to overcome the head start of the nationwide carriers, its nascent network will have coverage gaps, and, absent a reasonable automatic roaming agreement, dead zones or high roaming charges will repel customers from the pioneering carrier. Depriving smaller competitors access

¹⁵ *Id.* at ¶ 28.

¹⁶ *Id.*

to reasonable automatic roaming will discourage entrants from making the steep initial investment required to even attempt to overcome the nationwide carriers' first-mover advantage.

It was only a short time ago that Sprint and AT&T made these same arguments as they were developing their own facilities.¹⁷ Now, having built a robust network of their own through extensive use of automatic roaming—even in areas where they had been licensed to provide service—nationwide carriers seek to prevent other carriers from following suit. These nationwide carriers insist that it would harm competition if small, regional, and rural carriers “were allowed to ‘piggy-back’ on the network coverage of a competing carrier in the same market.”¹⁸ But the notion that Leap and other carriers are attempting to “free-ride” on the networks of others is sheer nonsense. The carriers supporting an automatic roaming rule are not looking for a free ride—but they are not willing to be taken for a ride. They are more than willing to pay rates that are just and reasonable, *viz.*, rates that fairly compensate the nationwide carriers and provide sufficient incentive to stimulate further facilities build-out.

In its *Roaming Order*, the Commission stated that an “in-market” exception is necessary because, “[i]f there is no competitive advantage associated with building out its network and expanding coverage into certain high cost areas, a

¹⁷ See Sprint PCS Ex Parte Automatic Roaming Presentation, WT Docket No. 00-193 (Mar. 7, 2002) at 6; Sprint PCS Reply Comments, WT Docket No. 00-193 (Feb. 5, 2001) at 7; Further Comments of Sprint Spectrum L.P. d/b/a Sprint PCS, CC Docket No. 94-54 (Jan. 5, 1998) at 7; Additional Reply Comments of AT&T Wireless Services, Inc., CC Docket No. 94-54 (Jan. 20, 1998) at 5–6.

¹⁸ *Roaming Order* at ¶ 49.

carrier will not likely do so.”¹⁹ True enough. But it is a fallacy to assume that nationwide carriers lose any competitive advantage if they are compelled to offer services at just and reasonable rates to competitors. The Commission has not provided a reasoned justification to support its conclusion that nationwide carriers are immune from the requirement that they provide common carrier services at just and reasonable rates upon request whenever the requesting carrier could theoretically—but not feasibly, or economically—build its own facilities.

B. The “In-Market” Exception Will Actually Discourage Build-Out, Depriving Consumers of the Benefits of Competition, New Service Models, and Seamless Wireless Coverage

It is the in-market exception, not home roaming, that will “harm facilities-based competition and negatively affect build-out . . . thus adversely impacting network quality, reliability and coverage.”²⁰ The “in-market” exception will deter facilities construction and may well cause carriers to *reduce* the size of their coverage footprints.

A competitive carrier licensee that is considering building out into a national carrier’s market may well decide that investment in new infrastructure will likely be fruitless, because coverage gaps or exorbitant automatic roaming rates will discourage customers from subscribing to the service. Thus, the “in-market” exception effectively digs a regulatory moat between national carriers and their smaller rivals, inhibiting the competition that is necessary for maintenance and growth of facilities-based networks. These disincentives are not limited to aspiring

¹⁹ *Id.*

²⁰ *Id.* at ¶ 49.

competitors' decisions about building out their existing licenses—the exception also will discourage carriers from acquiring additional licenses. The “home roaming” exception effectively imposes a second, far more onerous build-out requirement as a condition for holding the license. A carrier considering whether to acquire additional licenses must decide whether it can soundly afford to construct facilities immediately, throughout the entirety of a license area. If it cannot, then the license may simply become a hindrance, in that the carrier would be barred from demanding just and reasonable rates throughout the entire licensed area.

As written, the *Roaming Order* discourages competing carriers from trying to make in-roads in nationwide carriers' markets, and the consequent retraction of smaller carriers' coverage footprint will further entrench the market power of dominant carriers. Small, regional, and rural competitors of the nationwide carriers that would otherwise seek to expand their footprints will be far more hesitant to purchase new licenses, for acquiring new spectrum rights will entail substantial, immediate build-out costs if the license acquisition is to be at all worthwhile. Thus, rather than encouraging vigorous construction and maintenance of new facilities, the *Roaming Order's* exception encourages small, regional, and rural carriers to shrink their footprints. In the end, the *Roaming Order* leaves room for only two kinds of carriers: the existing set of national carriers who will continue to provide expensive, inflexible nationwide service plans, and carriers with very small footprints who do not aspire to compete beyond their limited borders. This diminution of competition will deprive consumers of lower prices and improved

services. It will also jeopardize the quality of existing facilities, for entrenched carriers will have less incentive to upgrade or maintain their facilities given the fewer alternatives available to customers receiving inferior service.²¹

Indeed, such contraction of service by competitors will do a particular disservice to under-served constituencies. A cornerstone of Leap's service, for example, is providing and expanding a low-cost, flat rate service to many consumers who are unable to afford traditional wireless plans offered by the nationwide carriers. Leap and its subscribers should not be penalized merely because Leap has developed its service in populated areas that reflect economically under-served demographics. Nor should the Commission advance a regulatory scheme that chills Leap and other carriers from continuing to expand the offering of such services. But these are precisely the perverse effects of the new "in-market" exception.

For similar reasons, the "in-market" exception will also undermine the *Roaming Order's* stated goal of encouraging seamless wireless coverage. In the long-term, the exception will discourage the build-out that is necessary for seamless, national coverage. In the short- and medium-term, as nationwide carriers force competing regional carriers from their markets, the exception will create more consumer confusion and gaps in service zones. With the *Roaming*

²¹ The lack of automatic roaming created by the "in-market" exception causes needless security risks for consumers as well, since carriers are not clearly obligated to provide full location-enabled E911 service in the absence of an automatic roaming agreement. *See Wireless E911 Location Accuracy Requirements*, Notice of Proposed Rulemaking, PS Docket No. 07-114, 22 FCC Rcd 10609, ¶ 17 (June 1, 2007). Eliminating the "in-market" exception would squarely address this service deficiency.

Order linking roaming ability to the crazy-quilt of overlapping, differently sized coverage areas, consumers will not be able to predict when they will lose service, and carriers will face substantial logistical difficulties and coverage disputes as they try to managing this confusing tangle of differing obligations. This uncertainty, of course, accrues to the benefit of established carriers, for whom automatic roaming is less essential. Despite their higher prices and less flexible plans, these carriers will nevertheless be able to attract frustrated customers with the promise of seamless national service.

C. The “In-Market” Exception Unfairly and Retroactively Upsets Carriers’ Settled Expectations

As already explained, the “in-market” exception will have potentially devastating consequences on the ability of new entrants to compete against the entrenched nationwide carriers by raising costs and depriving the market of the benefits of competition. The exception also diminishes the value of existing licenses, as their holders must either undertake heroic facilities construction or lose customers because of coverage gaps and high roaming rates. This about-face is irreconcilable with the build-out requirements that the Commission imposed as conditions of maintaining the licenses.

Furthermore, carriers purchased these licenses with the expectation that automatic roaming—including in-market—was a common carrier service subject to the obligations of Sections 201 and 202 of the Communications Act.²² That assumption was certainly reasonable—in fact, it is compelled by the text of the

²² 47 U.S.C. §§ 201, 202.

statute. Rather than creating new duties, the *Roaming Order* merely “clarifies” a pre-existing obligation to provide automatic roaming on just, reasonable, and non-discriminatory terms, and the Commission justifies that portion of its decision by looking to its earlier rulings with respect to manual roaming, which has long been subject to common carrier obligations.²³ With this regulatory backdrop and a history of carriers being able to construct large networks with the assistance of automatic roaming, smaller carriers have purchased large blocks of spectrum with the expectation that they would enjoy the same statutory protections historically afforded to nationwide wireless common carriers. The Commission’s decision to exempt “in-market” request for roaming is a surprising and unfounded departure from statutory obligations and Commission precedent.

D. Leap’s Own History of Aggressively Building Out Its Licenses Contradicts the Policy Justification for an “In-Market” Roaming Exception

Nothing in the record suggests that “in-market” roaming, as the Commission has defined the term, has actually discouraged facilities build-out. In fact, Leap has a demonstrated history of aggressively building out its licenses, despite the fact that it has limited resources and capital in comparison to the nationwide carriers. For instance, Leap successfully initiated service in all of the markets it purchased in Auction 58 within 20 months of acquiring the licenses. Within the last two years, Leap has doubled its number of cell sites nationwide, and it continues to expand its footprint in existing markets. It intends to maintain an aggressive build-out

²³ See *Roaming Order* at ¶ 23.

strategy with respect to its newly acquired AWS spectrum, once it has been made available. Leap has maintained this strategy while all the while seeking to complement its network through automatic roaming agreements with other, technologically compatible carriers. The Commission’s determination that “in-market” roaming discourages build-out is plainly belied by these facts.

Moreover, it is hypocritical for nationwide carriers to argue that Leap and other small, regional, and rural carriers should build facilities reaching every corner of their licensed areas when they still have not built out significant portions of their licensed areas—despite having as long as twenty years to do so.²⁴ These nationwide carriers are in no position to accuse carriers such as Leap of failing to build out its licenses with adequate dispatch.

III. THE “IN-MARKET” EXCEPTION RATIFIES AND ENCOURAGES ANTICOMPETITIVE ROAMING PRACTICES

As Leap and other carriers have explained, national carriers have used unreasonable pricing and discriminatory automatic roaming practices to diminish competition from small, regional, and rural carriers.²⁵ The *Roaming Order* as written treats large swaths of the wireless market as “in-market” and thus beyond the reach of the common carrier obligations attaching to automatic roaming services. This winnowing of the common carrier requirements will only exacerbate

²⁴ See Sprint PCS Automatic Roaming Ex Parte Presentation, *supra*, at 6.

²⁵ See, e.g., Leap Comments at 13–14; Leap Reply Comments at 7; RTG Comments at 10; Airpeak Comments at 6–8; SouthernLINC Comments at 11–15.

the disproportionate bargaining power national carriers have in negotiating roaming agreements, thus stifling competition.

As the Commission recognizes, consumers expect and demand affordable, automatic roaming and the seamless coverage it provides.²⁶ National carriers, facing competition from carriers offering more affordable and flexible plans, naturally are seeking to make their competitors' services less appealing. Denying small, regional, and rural carriers the ability to provide affordable automatic roaming is thus an attractive long-term strategy to large carriers. National carriers could achieve this goal by demanding from their smaller competitors exorbitant rates for automatic roaming services, thus increasing their competitors' operating costs. Leap has established that national carriers already are demanding supra-competitive rates,²⁷ and the lack of competition in wholesale automatic roaming market gives these carriers power to demand such rates.²⁸ Alternatively, a national carrier could simply refuse to enter into automatic roaming agreements with its smaller competitors. As Sprint argued before it established its nationwide network, national carriers "are both willing to forego their highly profitable in-market revenue stream" from roaming agreements "because they think they can increase their competitive position by handicapping their competitors."²⁹

²⁶ *Roaming Order* at ¶ 27.

²⁷ *See* Leap Comments at 13–14.

²⁸ *See* Leap Reply Comments at 8–11 & Attachment A (Report of David S. Sibley); Leap Comments at 6–12.

²⁹ Sprint PCS Reply Comments, *supra*, at 18.

Indeed, the exception allows national carriers to decline automatic roaming where it is most important—on the edges of areas where a carrier provides facilities-based services. As Sprint PCS previously explained, it is these areas where a carrier’s customers will roam most frequently,³⁰ and thus where they will feel the absence of automatic roaming most acutely, either through dropped calls or increased rates. This service frontier also marks the area in which a growing (and building) competitor is just starting to compete for a national carrier’s customer base, thus increasing the risk that a dominant carrier will seek to minimize meaningful choices for consumers. Given the large size of license areas, the borders of a provider’s facilities-based services will overwhelmingly fall within the “home roaming zone,” allowing national carriers to maximize the effect of their predatory behavior. The broadly defined “in-market” exception allows these anticompetitive practices to continue unabated throughout much of the market, and will likely make exorbitant rates and discriminatory practices even more common.

³⁰ *Id.* at 6–7.

CONCLUSION

The “in-market” exception to the automatic roaming obligation should be eliminated. It will lead to an outright subversion of the public policy benefits of automatic roaming, and it will harm consumers. Thus, Leap respectfully requests the Commission grant this petition.

Respectfully submitted,

- /s/ -

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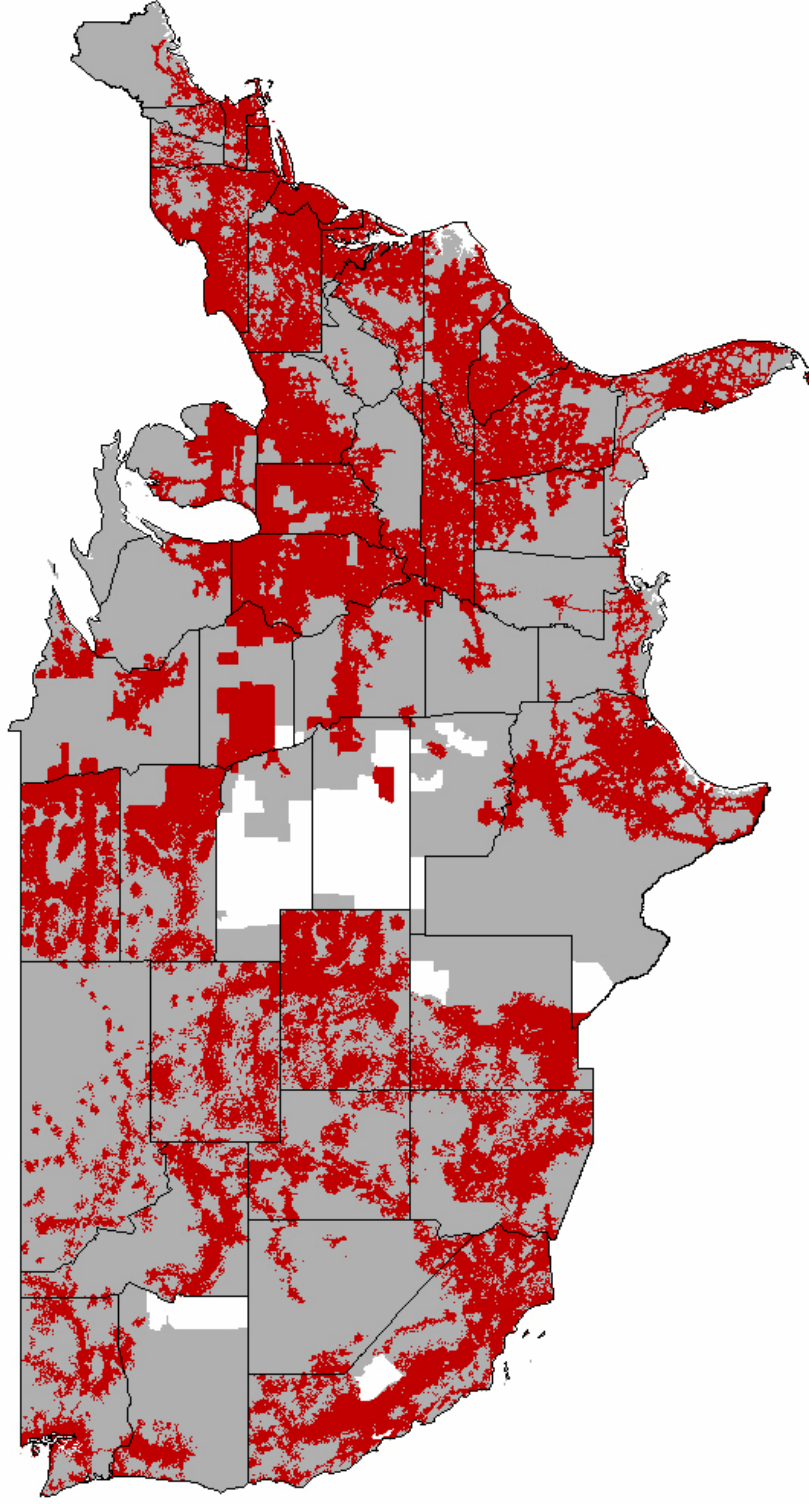
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Exhibit A

Verizon Wireless Native Footprint v. Licensed Area



Note: Licensing Information Source - MobileMarketInfo from MapInfo
Coverage Information Source - American Roamer.



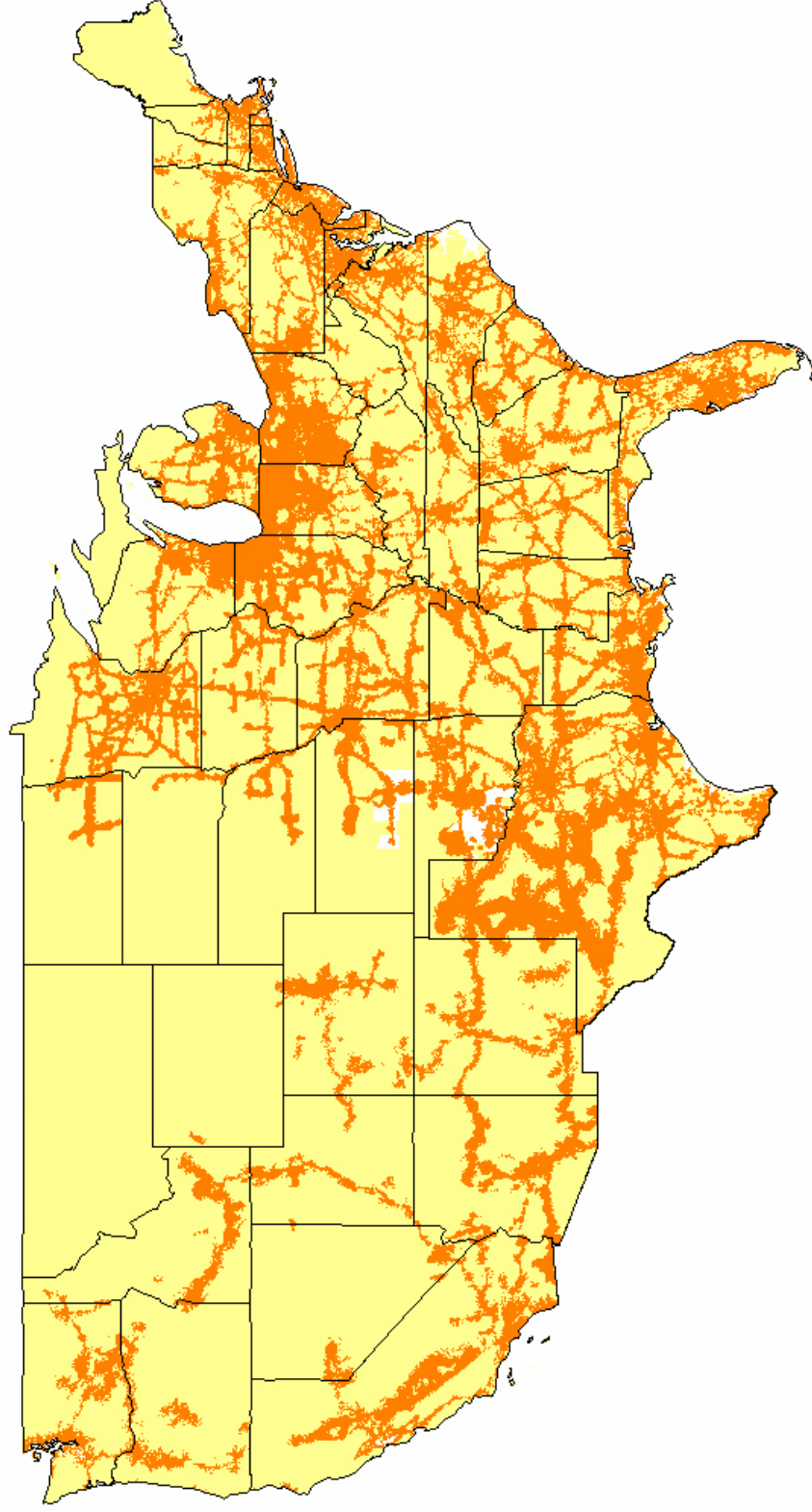
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Exhibit B

Sprint Native Footprint v. Licensed Area



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